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Fundamental rights and the interface between second and third pillar

ELEANOR SPAVENTA

It is necessary for him who lays out a state and arranges laws for it to presuppose that all men are evil and that they are always going to act according to the wickedness of their spirits whenever they have free scope.¹

5.1 Introduction

Following the terrorist attacks perpetrated first against the United States and later against Spain and the United Kingdom, action at international level to combat terrorism has grown steadily. Such action has been taken at both United Nations (UN) and European Union (EU) level in forms previously unknown in the field of international cooperation. In particular, both the UN and the EU have taken upon themselves the task of identifying organisations and individuals that are to be considered as terrorists by international and national communities alike. This process of identification of who or what should be considered a ‘terrorist’ occurs entirely in executive fora, thus challenging presumptions which have characterised post-war Western democracies as to the division of competences between executive, legislature and judiciary, as well as deeply affecting established systems of checks and balances. Furthermore, such evolution in intergovernmental action has not been matched by a corresponding evolution in the system of judicial protection. Thus, whilst international cooperation in the field of counter-terrorism activity might well be vital to ensure an effective response to the terrorist threat, international organisations are ill equipped, as things stand, to guarantee even the more

I am grateful to Michael Dougan for comments on an earlier draft. The usual disclaimer applies.

¹ N. Machiavelli, *Discorsi sopra la prima deca di Tito Livio*, translated by A. Gilbert (Durham, N.C.: Duke University Press, 1965).

basic rights of individuals and organisations that are targeted through international instruments. The complexity of the interaction between international, European and national law makes it equally difficult for national (and European) judiciaries to intervene in such cases. Those might entail gathering of sensitive evidence possibly relating to another State; problems stemming from hierarchy of norms; inevitable political pressures of compromising the executive's action and its standing in international relations.

In the EU context, the tension between intergovernmental cooperation and effective judicial protection has become manifest following the adoption of a series of counter-terrorism measures, and in particular following the adoption of an EU list of terrorists using a mixed second and third pillar legal basis; and following the adoption of a Community Regulation to freeze the assets of some of the individuals and entities listed in the relevant Common Position. In this sense, the interface between second and third pillar, the instrumental use of Treaty competences to exclude or limit both judicial and democratic accountability, has brought a considerable reduction of fundamental rights standards in the EU. This contribution explores such developments from a fundamental rights perspective. It focuses solely on action taken by the EU on its own account, since action taken by the EU as a result of UN action is extensively explored elsewhere in this book.² The overall claim of this contribution is that, given the lack of judicial protection available at EU level, the main responsibility for ensuring effective review in those cases rests with the national courts which have, as a matter of EU law, a duty to ensure that fundamental rights are adequately protected.

5.2 The EU terrorist lists: machiavellian use of competence or genuine counter-terrorist response?

The EU counter-terrorism response resulted in the adoption of a wide-ranging set of measures, spanning from the Framework Decision on Combating Terrorism,³ to that on the European Arrest Warrant,⁴ from

² See contribution by Piet Eeckhout in this volume.

³ Council Framework Decision on Combating Terrorism (2002/475/JHA), OJ 2002 L 164/3.

⁴ Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedure between Member States, OJ 2002 L 190/1.

the agreement with the United States on extradition,⁵ to that on Passenger Name Records.⁶ Amongst those measures, the EU has also adopted two Common Positions, which identified certain organisations and individuals as being involved in 'terrorist' acts. The two Common Positions should be distinguished since their status in Community law is different.

Common Position 2002/402⁷ has been adopted to give effect to UN Resolution 1390(2002), the so called Anti-Taliban Resolution.⁸ According to the latter, the UN Sanctions Committee draws up a list of those individuals and organisations who are alleged to be linked to the Taliban, Al-Qaeda and the like. National authorities must then take action to freeze the assets of those listed in the UN list. In order to give effect to the UN Anti-Taliban Resolution, the EU has adopted the above-mentioned Common Position, and a Community Regulation requiring the freezing of assets of those entities/individuals identified by the UN Sanctions Committee. We are not concerned with this Common Position, since, as said above, this is examined elsewhere in the book.

The other instrument which contains a list of alleged terrorists (including organisations) is Common Position 2001/931.⁹ This instrument is broadly speaking aimed at implementing UN Security Council

⁵ Agreement on extradition between the European Union and the United States of America, OJ 2003 L 181/27; see generally J. Wouters and F. Naert, 'Of Arrest Warrants, Terrorist Offences and Extradition Deals: an Appraisal of the EU's Main Criminal Law Measures against Terrorism after 11 September', 41 CMLRev. (2004), p. 909.

⁶ Agreement on extradition between the European Union and the United States of America, OJ 2003 L 181/27; see also Agreement on mutual legal assistance between the European Union and the United States of America, OJ 2003 L 181/34; Agreement between the European Union and the United States of America on the processing and transferring of passenger name record (PNR) data by air carriers to the United States, OJ 2006 L 298/29. For a rather critical appraisal of the agreement, see the debate in front of the plenary session of the European Parliament, *Use of Passenger Data*, debate of 11 October 2006, Document of 16/10/06, 13991/06 PE 326. The first PNR agreement had been adopted using Community competence and was annulled for lack of competence, Joined Cases C-317 and 318/04 *European Parliament v. Council and Commission* (2006) ECR I-4721. For this reason, the Council had to re-adopt the agreement relying on third pillar competence (Art. 38 TEU read in conjunction with 24(4) TEU). As a result, the agreement cannot be challenged in front of the ECJ, since the latter has no jurisdiction in relation to such matters.

⁷ Common Position 2002/402/CFSP concerning restrictive measures against Osama bin Laden, members of the Al-Qaeda organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, OJ 2002 L 169/4.

⁸ UN Security Council Resolution 1390(2002).

⁹ Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, OJ 2001 L 344/93.

Resolution 1371(2001),¹⁰ the general anti-terrorist Resolution, which provides that States must fight terrorism by adopting a series of measures, including the prevention and suppression of the financing of terrorist acts, the criminalisation of the financing of terrorist acts and the freezing of assets of those in any way connected with a terrorist activity. The general anti-terrorism Resolution, however, fails to define what is to be understood as a 'terrorist act' since agreement could not be reached on that point. Furthermore, in relation to this measure, there is no prior identification at UN level of those individuals and entities which should be subjected to restrictive measures.

Common Position 2001/931 has been adopted using a mixed second and third pillar competence, since it relates to two different types of terrorist organisations/individuals: one part of the list relates to those alleged terrorists who have a link with a third country, i.e. whose alleged activity is external to the EU borders; the other part of the list is concerned with alleged terrorists whose activity is wholly internal to the EU. The distinction between 'foreign linked' and 'home' terrorists is important because for the former, the Council was able to use Common Foreign and Security Policy (CFSP) competence (Art. 15 TEU) and therefore rely on the *passarelle* clause contained in the EC Treaty (Arts. 301 and 60 EC, complemented by Art. 308) in order to trigger the Community competence to adopt a Regulation to freeze the assets of those identified in the list.¹¹ Like in the case of the UN-derived Regulation, residual competence of the Community was necessary to adopt the Regulation, since the freezing order does not specifically concern 'third countries'.

In relation to home terrorists, the Council had to rely on Article 34 TEU, thus adopting the act using police and judicial cooperation in criminal matters competence. Since in this case there was no 'foreign' element involved, the Council considered that there was no possibility of justifying action at CFSP level. Given that this part of the list was adopted using third pillar competence, the Community could not enact a freezing Regulation as there is no *passarelle* clause bridging the first and third pillars. As a result, there is no direct 'legal consequence' arising from being included in the EU domestic list: there is no freezing of assets at

¹⁰ UN Resolution 1373(2001), 28 September 2001.

¹¹ Council Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2001 L 344/70.

Community level, and the only obligation imposed upon Member States by the Common Position is that of affording 'each other the widest possible assistance in preventing and combating terrorist acts' and to 'fully exploit' their existing powers in relation to enquiries and proceedings conducted in relation to any of the organisations or individuals listed in the Annex to the Common Position.¹² Common Position 2001/931 appears then to be, for home-related terrorists, little more than a naming and shaming instrument. Such naming and shaming is obviously not without consequences for those therein mentioned; however, even if such consequences might be very serious, there is no possibility in relation to this list to bring review proceedings in front of the European courts. Title VI of the EU Treaty does not provide for the possibility to bring direct proceedings for annulment of third pillar instruments. Thus, individuals listed in the Common Position cannot challenge either the legality of the Common Position, or their inclusion in the list. Furthermore, third pillar Common Positions are excluded from the limited preliminary ruling jurisdiction of the Court.¹³

Common Position 2001/931 and Regulation 2580/2001 therefore raise considerable problems since the EU's system of judicial protection seems, when available at all, inadequate to the task of protecting individuals from executive action. We will first consider the problems raised by Regulation 2580/2001, then turn to the problems faced by those whose name has been included in the home-terrorist list.

5.3 Expanding Community competence beyond Community objectives: the adoption of Regulation 2580/2001

Individuals and organisations whose alleged terrorist activity takes place outside the territory of the EU are identified by the Council in a list annexed to Common Position 2001/931. Such list is drawn up 'on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority'. The competent authority is a 'judicial authority' or, where judicial authorities have no competence, 'an equivalent competent authority in that area'.¹⁴ The decision might concern the instigation of investigations, prosecutions or

¹² Article 4 Common Position 2001/931/CFSP. ¹³ Article 35 TEU.

¹⁴ Article 1(4) Common Position 2001/931.

condemnation for terrorist acts. Article 1(6) provides that such list must be reviewed at regular intervals, and at least once every six months, to ensure that there are grounds for keeping individuals and entities on the list. According to Article 2 Common Position 2001/931, the European Community must order the freezing of the funds of those identified in the list. This has been done by means of Regulation 2580/2001 which provides for the freezing of assets of those identified in a list drawn up by the Council acting in unanimity in accordance with the provisions of Common Position 2001/931. De facto the list drawn in the Common Position is then replicated, for those who have a foreign link, in a Community instrument for the purpose of freezing assets. The first problem that arises in relation to Regulation 2580/2001 relates to whether the Community had competence to enact such measure.

As mentioned above, Regulation 2580/2001 was adopted using two legal bases: Article 60 read in conjunction with Article 301 EC, which provide the bridge between CFSP and the Community; and Article 308 EC, which provides for the residual competence of the Community. The reason for the dual legal basis is that Article 60 EC refers to measures on the movement of capital and payments as regards 'third countries concerned'. Thus, in relation to those individuals and entities that do not have a specific connection with a third country, there was no other competence in the EC Treaty than the Community residual competence. In the *Yusuf* and *Kadi* cases,¹⁵ the Court of First Instance (CFI) found that in relation to the UN-derived lists, the Community had competence to adopt a Regulation which provides for the freezing of assets of listed entities and individuals, even when such entities and individuals did not have a connection with third countries.

In the CFI's opinion, such competence could not rest on Articles 301 and 60 EC alone, since those provisions require the measure to be adopted in relation to third countries. Whilst such a link with third countries is present in relation to so-called smart sanctions, i.e. sanctions that target specific individuals which have dealings with, or economic activities directed at, the third country which is being sanctioned, such is not the

¹⁵ Case T-306/01 *Yusuf and Al Barakaat v. Council and Commission* (2005) ECR II-3533; Case T-315/01 *Kadi v. Council and Commission* (2005) ECR II-3649; the two rulings are virtually identical for what we are concerned and, therefore, thereafter we will refer solely to the *Yusuf* ruling.

case when the individual or organisation targeted cannot be clearly linked with a third country. That was the case in relation to the Anti-Taliban Regulation since, following the regime change, the Taliban did not have a specific connection with the Afghan Government. The CFI also found that Article 308 EC, which provides for the residual competence of the Community, could not be relied upon, by itself, as a legal basis for the Regulation freezing the assets of those identified in the list. In order to rely on Article 308 EC, it is necessary to link the action taken to one of the objectives of the Community; however, the CFI found that neither the CCP, nor the free movement of capital or the risk of a distortion of competition, could be relied upon to establish such a link. Further, the CFI held that Article 308 EC cannot be of help in 'giving the institutions general authority to use that provision as a basis with a view to attaining one of the objectives of the Treaty on European Union'.¹⁶ Otherwise, the CFI reasoned, the specificity of the pillars would be compromised and the Community would gain competence in all matters covered by the second and third pillar.

However, the CFI then found that a cumulative reading of Articles 308, 301 and 60 EC, was capable of establishing Community competence to adopt a Regulation freezing the funds of individuals who had no connection with a 'third country'. In order to make such finding, the CFI reasoned as follows. Articles 60 and 301 EC are 'quite special provisions': they establish the passarelle between the CFSP and the Community, and when action is taken under those provisions, the action is in fact that of the Union not that of the Community. The CFI then remarked how, according to Article 3 TEU, the Union is to be served by a single institutional framework, and how it has to ensure consistency of its external activities as a whole. It then continued: 'Now, just as the powers provided for by the EC Treaty may be proved to be insufficient to allow the institutions to act in order to attain, in the operation of the common market, one of the objectives of the Community, so the powers to impose economic and financial sanctions provided for by Articles 60 EC and 301 EC, namely, the interruption or reduction of economic relations with one or more third countries, especially in respect of movements of capital and payments, may be proved insufficient to allow the institutions to attain *the objective of the CFSP, under the Treaty on European Union, in view of*

¹⁶ Case T-306/01 *Yusuf and Al Barakaat v. Council and Commission* (2005) ECR II-3533, para. 136.

which those provisions were specifically introduced into the EC Treaty.¹⁷ For this reason, the Community had competence to enact the contested Regulation.

The CFI's purposive reasoning is very interesting: the creation of the bridge between two pillars, which are otherwise linked only by the common provisions of the TEU, allows for a greater flow than appears at first sight. Thus, Article 308 EC can be used to attain the objectives set out in Articles 301 and 60 EC. Pragmatically, one might well agree with the CFI and note that when those provisions were drafted the world was a very different place. It is not surprising, then, that the drafters did not provide for the possibility to enact sanctions against individuals and entities acting on their own accord, since the situation warranting those types of sanctions had not yet presented itself. However, the principle of attributed powers is not only a fundamental constitutional principle of the Treaty, it is also a guarantee for national parliaments, and for the democratic process as a whole. This was made clear in Opinion 2/94 where the ECJ held that Article 308 EC 'cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community'.¹⁸ By allowing the use of that provision to widen the bridge between the two pillars for the attainment of CFSP objectives, rather than for the attainment of Community objectives 'in the course of the operation of the common market', the CFI, however, did exactly that: it broadened the scope of Community competence. In such delicate matters, where individual rights are at stake, this result might be seen as not entirely satisfactory, not the least since it prevented a national debate as to whether such type of sanctions should be enacted by the Community and whether, if so, special guarantees should not accompany Community action. In this respect, the CFI failed to notice that the expansion of Community competence in this case would entail a 'modification of the system for the protection of fundamental rights', since it affects the guarantees of effective judicial protection provided for in domestic systems;¹⁹ that it clearly had 'fundamental institutional

¹⁷ Case T-306/01 *Yusuf and Al Barakaat v. Council and Commission* (2005) ECR II-3533, para. 163.

¹⁸ Opinion 2/94 *Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (1996) ECR I-1579, para. 30.

¹⁹ *Ibid.*, para. 35.

implications' for the Member States,²⁰ since it affected the right and duty of national parliaments to scrutinise executive action in a field which affects individual rights, and that therefore it went beyond the scope of Article 308 EC.

For the time being, however, the issue of competence should be treated as a *fait accompli* also in relation to Regulation 2580/2001, since the fact that the Regulation at issue in *Yusuf* was implementing (indirectly) a Security Council Resolution played no part in the CFI's assessment of the Community competence to act.

It is now time to turn our attention to more substantive issues in relation to the listing process and to the judicial remedies available to those who are included in the list. We will first consider the list as attached to Regulation 2580/2001, then turn to the list annexed to Common Position 2001/931. Whilst, as we have seen above, the list in the former reproduces partially the list in the latter, the legal issues the two raise are different since in relation to the latter there is no jurisdiction of the European courts.

5.4 The right to effective judicial protection and the foreign terrorist list

As mentioned above, the Community judicature has full jurisdiction, both in direct actions and in preliminary rulings, in relation to the list of 'foreign' terrorists attached to Regulation 2580/2001.²¹ Thus, there is as much access to the judicature as it is possible in the Community system and the individual is not deprived of judicial protection. The problem, however, is whether such protection is truly effective and whether it is substantive, as well as formal.

A recent ruling of the CFI might serve to illustrate the problem. In the *Organisation des Modjahedines du peuple d'Iran* (OMPI),²² the claimants

²⁰ *Ibid.*, para. 35.

²¹ Those listed in the annex to the Regulation are deemed to be directly and individually concerned for the purposes of Article 230 EC, see, e.g. Case T-228/02 *Organisation des Modjahedines du peuple d'Iran*, judgment of 12 December 2006. This said, the question of standing might still be problematic in relation to organisations, see, e.g. T-299/02 *PKK and KNK v. Council* (2005) ECR II-539, overruled by C-229/05P *PKK and KNK v. Council*, judgment of 18 January 2007, *nyr*.

²² Case T-228/02 *Organisation des Modjahedines du peuple d'Iran*, judgment of 12 December 2006.

brought proceedings against the Council challenging the legality of their inclusion in the list annexed to Common Position 2001/931, as well as their inclusion in the list annexed to Regulation 2580/2001, which had the effect of freezing their assets. It appears from the case that the decision to include the applicants in such lists was instigated by the United Kingdom, which also included them in its own terrorist list. In challenging their inclusion in the lists, the claimants relied on several pleas, amongst which the most relevant for our analysis are infringement of the right to a fair hearing; infringement of essential procedural requirements; infringement of the right to effective judicial protection; infringement of the presumption of innocence; and a manifest error of assessment.

The process of 'listing' is surrounded by a certain secrecy. According to Common Position 2001/931, the list is drawn on the basis of 'precise information or material in the relevant file which indicated that a decision has been taken by a competent authority' in respect of those concerned. And, a 'competent authority' means a judicial authority or, when such authority does not have competence, an 'equivalent' competent authority. De facto it appears that persons and organisations are placed on the EU and EC lists at the request of one of the Member States, and that the Council exercises only a formal power of scrutiny.²³ Those who are to be included on the list have no right to submit observations either before or after having been placed on the list; and might well not be aware of the reason that led to their inclusion, or of the authority (and the Member State) that instigated the listing.²⁴ Indeed, since inclusion is at the request of the Member States, the Council itself might not be in a position to

²³ On this point, see E. Spaventa, 'Fundamental what? The difficult relationship between foreign policy and fundamental rights', in M. Cremona and B. de Witte (eds.), *EU Foreign Relations law: Constitutional Fundamentals* (Oxford: Hart Publishing, forthcoming); and also I. Tappeiner, 'The fight against terrorism. The lists and the gaps', *Utrecht Law Review* (2005), p. 97, also available at: www.utrechtlawreview.org.

²⁴ Following the CFI ruling in Case T-228/02 *Organisation des Modjahedines du peuple d'Iran*, judgment of 12 December 2006, nyr, the Council has indicated that it is going to 'provide a statement of reasons to each person and entity subject to the asset freeze, wherever that is feasible, and to establish a clearer and more transparent procedure for allowing listed persons and entities to request that their case be re-considered', EU Council Secretariat Factsheet 'Judgement of the Court of First Instance in the OMPI case T-228/02'. And in the Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 December on the list of persons, groups and entities to which Regulation 2580/2001 applies (OJ 2006 C 320/02), the Council expressly stated that it is open to those listed to request a statement of reasons when the statement had not already been provided.

declare the information requested, either because that information does not appear in the file, or because disclosure might prejudice security interests of the Member State concerned. Furthermore, in at least one instance, the inclusion of an individual in the list appears to have been at the request of a third country.²⁵

In analysing the lawfulness of the OMPI's inclusion in the list, the CFI, most likely mindful of the political minefield in which it had landed, limited its observations to issues of procedural propriety. The CFI started by finding that both the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection all applied in the context of the decision to freeze funds.

Acknowledging that the listing procedure initially takes place at the national level, the CFI held that the right to be heard played first (and foremost) in the context of the national procedure.²⁶ However, it should be noted, that such a right does not stem from Community law since, prior to the adoption of the decision which leads to inclusion in the list, the matter can be said to fall exclusively within national law. In contrast to the substantive obligations imposed upon Member States in relation to the delisting process at UN level,²⁷ it is unlikely that Community law might be of use in increasing (or establishing) procedural guarantees at this stage of the domestic procedure. However, once the person/organisation is or has been included in the Community list, Community law imposes upon the Council a duty to respect Community law rights, including those rights deriving from the general principles. In defining the extent of such rights, the CFI substantially accepted the argument put forward by the United Kingdom to the effect that it is not for the Council to decide whether the proceedings conducted at national level are well-founded and whether the claimant's fundamental rights were respected in that context. Thus, the

²⁵ See, e.g. the transcript of comments on combating the financing of terrorism made by Alan P. Larson, Under Secretary for Economic, Business, and Agricultural Affairs, in testimony before the House (Congress) Committee on Financial Services on 19 September 2002, available at: http://useu.usmission.gov/Dossiers/Terrorist_Financing/Sep1902_Larson_Testimony.asp; 'The European Union has worked with us to ensure that nearly every terrorist individual and entity designated by the United States has also been designated by the European Union', and also the testimony of Juan C. Zarate (Deputy Assistant Secretary, Executive Office) *Terrorist financing and financial crime*, US Department of the Treasury, Senate Foreign Relations Committee, 18 March 2003, JS-139, available at <http://www.ustreas.gov/press/releases/js139.htm>.

²⁶ Case T-228/02, para. 119.

²⁷ Case T-253/02 *Ayadi v. Council*, judgment of 12 July 2006, nyr.

claimant's rights in relation to the inclusion in the EU list is limited to a right to make their views known about the legality of such inclusion, i.e. whether there is a decision of a competent authority and whether the material in the file shows that such a decision was taken by a competent authority, etc. Furthermore, the complainants also gain a right to be notified of the evidence adduced against them (or such evidence as there is in the file) before, or soon after, their inclusion, or their reinclusion in the list. And, the Council has a duty to state the reasons which led it to include the person in the list. Such rights can, however, be curtailed for overriding reasons of public interest, and in particular for reasons relating to national security. Further, the CFI also clarified that it must be put in a position to actually review the lawfulness of the inclusion in the list: in the case at issue, neither the United Kingdom nor the Council had provided it or the claimant with sufficient information as to either the authority which had taken the decision, or the reasons that led Council to include the applicant in the list. Furthermore, the CFI also found that OMPI's right to be heard had been violated; for these reasons, the decision to include the OMPI in the list was quashed.

The *OMPI* ruling is very complex, and it falls beyond the scope of this contribution to provide a detailed analysis of it. However, a few remarks are worth making. From a fundamental rights perspective, the CFI's approach is of course to be welcomed since it sets at least some procedural limits to be respected by the executive when imposing economic sanctions on individuals. And, it also makes clear that violation of such procedural guarantees might lead to the annulment of the decision to include a person/organisation in the list. However, it should be noted that the CFI refused to engage in a substantive review of the reasons which led to inclusion, and also indicated that such substantive review would never fall among its tasks. In the CFI's view, such substantive review is a matter for the competent authority at national level. Furthermore, the CFI excluded that Council has a duty to scrutinise the national authority's decision to include someone in the list.

The effect of this finding is to establish a system of quasi-automatic recognition of decisions taken by authorities in the Member States, and possibly also in third countries. Whilst admittedly such recognition is not automatic, since a Council decision is still necessary, the CFI's statement to the effect that even the Council is not required to look at the substantive reasons that led to the national decision is not very satisfactory, especially

when one considers it together with the statement that Council should not even look at whether the fundamental rights of the parties have been respected at national level. This might of course lead to decisions taken in breach of fundamental rights (and yet in conformity with national law) to be given a pan-European effect, without any possibility of redress. And, this would presumably be the case even when the decision had been taken by an authority of a third country, even in instances in which the third country's standard of fundamental rights protection falls below that guaranteed by the EU. In a field like terrorism, where the very definition and decision as to what and who constitutes a terrorist might be politically motivated, this is a regrettable state of affairs. This is even more the case since such pervasive effects in national law were achieved without a clear Parliamentary mandate and through an expansive interpretation of Community competence.

In any case, and regardless of any misgivings one might have about both the Community regime and the *OMPI* ruling, it should be queried how effective the jurisdiction of the Community courts is. At the time of writing, the ruling of the CFI had yet to be given effect: the *OMPI* was still listed in the Annex to Regulation 2580/2001 and its assets were still frozen.²⁸ Furthermore, the Council has indicated that it did not consider that the ruling applies to the list annexed to the Common Position since the CFI did not annul the applicant's inclusion in that list. Whilst it is true that the CFI could not comment upon the legality of the inclusion of the *OMPI* in the list annexed to the Common Position, since it has no jurisdiction over such instruments, the obligation to respect fundamental rights applies also to CFSP and third pillar instruments by virtue of Article 6 TEU and of the general principles of EU law. The finding that the applicants' fundamental rights had been infringed applies a fortiori to the list adopted in the context of the Common Position, and, if anything, it applies even more strongly in that context *because* of the lack of jurisdiction of the Community courts. However, the Council made clear that it has no intention of taking the *OMPI* off that list.²⁹ In its press release the Council also indicated that the freezing of funds did no longer apply to *OMPI*. This notwithstanding, the Council has failed to amend the list

²⁸ Cf. A. Rettman, 'EU backing down on terror list secrecy', *EUobserver*, 16 January 2007.

²⁹ EU Council Secretariat Factsheet *Judgment of the Court of First Instance in the OMI Case T-228/02*, para. 3.

annexed to the Regulation.³⁰ This poses some not insignificant problems for the authorities and banks which have to comply with the freezing order: theoretically, once an act has been declared null by a competent court, and lacking a statement of continued validity pending the adoption of a new and valid act, that act is legally non-existent.³¹ Practically, however, it is likely that those who have to execute the freezing order will be unwilling to take the risk of releasing the assets without having received clear instructions to that end. The only concession that the Council has made to the CFI ruling was to issue a notice concomitant to the Decision which added some people and entities to the list annexed to Regulation 2580/2001.³² In such notice, the Council alerted those included in the new list to their right to request reasons, to their right to apply to Council for a decision to reconsider, and to their right to bring Article 230 EC review proceedings in front of the CFI.

Finally, there is an open question as to whether the EU terrorist lists should be considered as still in force. As said above, Article 1(6) of Common Position 2001/931, which applies also to Regulation 2580/2001, provides that the names in the list should be reviewed at regular intervals and *at least* once every six months 'to ensure that there are grounds for keeping them on the list'. There are two questions, closely interconnected, in relation to this provision: first, does the review necessarily take the form of a new decision, or can it be seen as simply a confirmatory act? And second, what is the legal consequence of failure to carry out the review?

As for the first point, Council practice indicates that a new decision must be taken, when the review is carried out, in relation to *all* entities listed. Thus, the Council has so far updated the list by means of Common Positions and decisions (for that annexed to the Regulation) which

³⁰ Council Decision 2006/1008 of implementing Article 2(3) of Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2006 L 379/123.

³¹ Of course, the CFI ruling does not affect freezing of funds pursuant to national law, see, e.g. Hansard 8 January 2007, reply by Mr McNulty to a question posed by Mr David Jones 'The Court of First Instance did not rule on the substantive question as to whether People Mojahedin Organisation of Iran is a terrorist group; its judgement was on EU procedures, and as such has no effect on the UK's domestic proscription arrangements.'

³² Notice for the attention of those persons/groups/entities that have been included by Council Decision 2006/1008/EC of 21 December on the list of persons, groups and entities to which Regulation 2580/2001 applies, OJ 2006 C 320/3.

repealed the previous instruments.³³ This practice is consistent with a purposive interpretation of Article 1(6), since the review establishes a guarantee for those listed and it cannot be interpreted as being a mere formal requirement. Such interpretation seems also consistent with the CFI ruling in the *OMPI* case, since the CFI has indicated that the decision to keep someone on the list following the review is to be considered a new decision so that those included have a right to be heard in relation to that decision. Furthermore, if the duty to review implies the duty to adopt a new decision in respect of all applicants, then it means that, in contrast to the UN list, unanimity is required to place someone on the list, and not to strike someone off.³⁴

The second interpretative problem relates to the legal value of the lists in the event in which six months elapse without Council having adopted a new decision. This was the situation at the time of writing since the last decisions in respect of the lists were taken in May 2006.³⁵ Article 1(6) does not appear to introduce an automatic sunset clause, i.e. it does not state that the Common Position and decisions which contain the list have a validity limited to six months. However, the wording of that provision suggests that the review should be considered an essential procedural requirement, non-compliance with which renders the decision open to legal challenge after the expiry of the six-month term. The duty to review is in fact phrased in mandatory terms, so that there seems to be no discretion vested in the Council as to when, and whether, to engage in the review process. Furthermore, this interpretation is also in line with the very purpose of the review which is aimed at ensuring that

³³ Last updates, Council Common Position 2006/380/CFSP of 29 May 2006 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2006/231/CFSP, OJ 2006 L 144/25; and Council Decision 2006/379 of 29 May 2006 implementing Article 2(3) of Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Council Decision 2005/930, OJ 2006 L 379/123.

³⁴ And this might well be the reason why Council has failed to review the May lists: thus it might be that agreement could not be reached on whether to keep on the list some of those therein listed.

³⁵ Council Decision 2006/379 of 29 May 2006 implementing Article 2(3) of Regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Council Decision 2005/930, OJ 2006 L 379/123; and Council Common Position 2006/380/CFSP of 29 May 2006 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2006/231/CFSP, OJ 2006 L 144/25. The fact that the lists have not been renewed is all the more serious given the change in composition of Council following the accession of Bulgaria and Romania.

the detrimental effects that such decisions have on individuals and organisations are truly kept to the minimum necessary for the protection of the public interest.

5.5 The right of effective judicial protection and the domestic terrorist list

It is now time to consider the problems arising from the EU domestic terrorist list. In relation to those individuals and organisations who have no link with a third country, no freezing Regulation could be adopted since there is no *passarelle* clause between the third and the first pillar. Thus, and as said at the beginning, the EU domestic terrorist list is little more than a naming and shaming exercise: individuals and organisations are put on the list, their assets are not frozen since there is no competence to do so at EU level, and the only obligation falling upon Member States is to ‘fully exploit’, upon request, their existing powers in accordance with EU law and international conventions.³⁶ Thus, the inclusion in the EU list does not impose upon the Member States an obligation to outlaw the organisations therein listed; or for those Member States which have proscription lists at domestic level, an obligation to transpose the EU list in their own domestic instrument;³⁷ and there is no duty to freeze the assets of those individuals and organisations which are identified in the Common Position. Given the fact that Member States are under no duty to take specific action against those listed in the Common Position, one could well wonder why such listing was deemed necessary at European level. Similar cause for perplexity is provoked by the decision to adopt such a list using a Common Position, the only Title VI instrument which is entirely excluded from the, already limited, jurisdiction of the ECJ.³⁸ After all, Common Positions are policy instruments which, according

³⁶ Article 4 Common Position 2001/931/CFSP.

³⁷ Cf. in the UK, the Anti-Terrorism Act 2006, and 2000, and the list of the proscribed groups, available at: <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups>. Several of the groups which are listed in Common Position 2001/931 as amended, are not listed in the UK list.

³⁸ I have argued elsewhere that Common Position 2001/931 is, at least so far as concerns home terrorists, a decision and as such it is subject to the (voluntary) jurisdiction of the ECJ, see Spaventa ‘Fundamental what?’, cited; see also Advocate General Mengozzi’s opinion in Case C-355/04 P *Segi et al v. Council*, delivered 26 October 2006, case still pending at the time of writing.

to Article 34(2)(a) TEU should define ‘the approach of the Union to a particular matter’. Furthermore, the European Parliament has no role to play in the adoption of Common Positions, unlike for decisions and framework decisions where it has a right to be consulted. Given that the choice of a policy instrument to identify individuals and organisations seems rather ill-fitted with the aim pursued by the measure, one could well wonder whether such choice was not driven by the desire to limit democratic and judicial scrutiny.

Since there is no jurisdiction of the European courts, the only avenue open to applicants wishing to be delisted is that of pursuing their case in front of the national courts. However, action in front of national courts might well not be particularly effective not the least since, even should the national court make a finding favourable to the person/entity listed, that finding would not have effects beyond the domestic jurisdiction. We are first going to analyse the obstacles to effective judicial protection, to then turn to the assessment of the powers and duties of the national courts under EU law.

The first hurdle that the applicant needs to overcome is that of establishing standing in front of a national court: in most jurisdictions standing is conditional upon there being a challengeable act to attack. In relation to the EU list, however, that might not be the case since the ‘naming and shaming’ is self-executing, i.e. it does not necessarily need implementation at national level. Its purpose is achieved by virtue of its very existence. And, as we have seen in the previous sections, the fact that inclusion in the list should follow a decision taken by a ‘competent authority’ is not in itself guarantee of it being a challengeable decision. First, it seems that the competent authority might be external to the EU. Second, the applicant might well be in the dark as to which authority, and which Member State, has taken the decision concerning him/it. As we have seen in the *OMPI* case, one of the reasons which led the CFI to quash the inclusion of the applicant in the list was the fact that neither the Council nor the United Kingdom could, or wanted to, disclose the identity of the ‘competent authority’ which had initially taken the decision which determined the *OMPI*’s inclusion in the list. Third, even when the authority is known to the applicant, the information upon which inclusion in the list is based might not have been disclosed. In this respect, it should be considered whether the *OMPI* ruling imposes substantive duties of disclosure upon national authorities and/or Council.

Here we should distinguish the case in which the applicant challenges the original decision taken before its inclusion in the EU list³⁹ from the case in which the applicant challenges such decision after having been included in such list. The distinction is important since in the former situation the matter is wholly regulated by national law and European law cannot be of assistance. In the latter case, however, the issue clearly falls within the scope of European law and, for this reason, some procedural guarantees should apply as a matter of EU law. In this respect it is worth recalling the ruling in *Ayadi*.⁴⁰ That case concerned the inclusion of the applicant in the list annexed to the Anti-Taliban Regulation, i.e. the Regulation adopted in order to give effect to the UN Anti-Taliban Resolution. As said above, individuals and organisations whose assets are to be frozen are identified by the UN Sanctions Committee, and the UN list is then transposed in a Union and Community instrument. Competence to strike people off the list rests with the UN Sanctions Committee and the delisting procedure can be triggered only by a State which makes representations on behalf of the applicant. In *Ayadi*, the CFI clarified that Member States have substantive obligations in relation to the delisting process (such as the duty to consider the applicant's case; the duty to allow for judicial review of the decision not to make representations at UN level, etc.) and that such obligations are binding upon national authorities by virtue of Community law, following the established principles according to which, when Member States have a discretion in implementing Community law, they have a duty to comply with fundamental rights as general principles.

The reasoning in *Ayadi* can be transposed to the EU list, even lacking the Community courts' jurisdiction. Thus, the national authority which has taken the initial decision should be under the same obligation as those outlined by the CFI in relation to Council in the *OMPI* ruling. Once the organisation/individual has been put on the EU list, the matter falls within the scope of EU law and for this reason the procedural and fundamental rights guarantees imposed by EU law must apply to proceedings at national level also in respect to the national competent authority. As a result, it can be argued that, as a matter of EU law, such an authority has a duty to state the reasons which led it to take the decision (subject to the

³⁹ See to this effect the *obiter dictum* in Case T-228/02, para. 119.

⁴⁰ Case T-253/02 *Ayadi v. Council*, judgment of 12 July 2006, nyr.

public security caveat) and that fundamental rights as general principles of EU law apply in full. Finally, and as mentioned above, the *OMPI* ruling applies also to the Common Position. Whilst the Community courts lack jurisdiction to enforce such obligations, Council should consider itself bound by it and therefore individuals and organisations listed in the Common Position should have a (non-enforceable) right to a statement of reasons from Council as well as a right to be heard.

Leaving aside the practical difficulties that might arise in accessing a national court, there are serious problems as to the extent to which the national court could extend its review beyond the decision of the national authority. In this respect, one should consider Advocate General Mengozzi's opinion in the case of *SEGI*. *SEGI* is an alleged terrorist organisation fighting for Basque independence which was included in the list attaching to Common Position 2001/931. *SEGI* first brought its case in front of the ECtHR, which refused jurisdiction on the grounds that the issue was one of potential, rather than actual, violation of fundamental rights.⁴¹ It then brought proceedings for damages in front of the CFI which dismissed the action for manifest lack of jurisdiction. In an *obiter dictum*, the CFI acknowledged that probably no judicial remedy would be available to the applicant in relation to its inclusion in the EU list.⁴² In his opinion in the appeal to the CFI ruling, Advocate General Mengozzi focused on the latter *obiter* to express his views on the duties of national courts in relation to third-pillar instruments especially, if not only, when the European courts lack jurisdiction. In particular, he was concerned with the non-availability of an action for damages in relation to EU law. Relying on the fact that the EU is, by express provision of the TEU, bound by fundamental rights and the rule of law, the Advocate General argued that the fact that the European courts lacked jurisdiction did not imply that there was no judicial remedy available. Rather, by relying on the duty of loyal cooperation which applies also to the third pillar,⁴³ Mr Mengozzi found that 'in the context of the third pillar of the Union as well it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection and for their courts to interpret and apply

⁴¹ Decision declaring the inadmissibility of the case *Segi and Gestoras pro-Amnistia v. 15 States of the European Union*, appl. No. 6422/02 and 9916/02, 23 May 2002.

⁴² Case T-388/02 *Segi et al v. Council*, order of 07/06/04, appeal pending (Case C-355/04 P), para. 38.

⁴³ Case C-105/03 *Pupino* (2005) ECR I-5285.

the national procedural rules governing the bringing of actions in such a way as to ensure such protection'.⁴⁴ Furthermore, the Advocate General argued that national courts should consider themselves competent to declare a third pillar instrument invalid, even when they are able to refer the matter to the ECJ. Thus, the principle established by the CFI in *Foto-Frost* should not apply to the third pillar since in the latter, unlike in the Community pillar, there is no complete system of legal remedies and there is no system to ensure the uniform application of EU law. As a result, in the Advocate General's opinion, not only do individuals have a right to seek annulment of a Common Position which concerns them, but also have a right to damages which must be considered as inherent in the TEU. And in relation to those matters the standard of fundamental rights protection to be applied is (or should be) that of EU law, rather than that of national constitutional law.

The arguments put forward by Advocate General Mengozzi are compelling and it is to be seen whether the ECJ will be willing to espouse them in a ruling which would arguably go beyond its jurisdiction. Even were that the case, it is clear that given the institutional structure of the third pillar, the only means of guaranteeing effective judicial protection are in the hands of national courts. And, as argued by Mr Mengozzi, the need to ensure such a protection in relation to EU instruments should be seen as an obligation placed upon national courts directly by the EU system.

As well as the arguments outlined above, there are other considerations which could lead the national courts to take as active role as possible in relation to these matters.

First, one could argue that the Council Common Position is *ultra vires* since its adoption conflicts with Article 6 TEU which is a provision binding on the EU institutions regardless of whether the European courts have jurisdiction in assessing the breach. Thus, it could be argued that the very adoption of an act at EU level which has detrimental effects on individuals, and which does not provide for an effective system of judicial protection that includes the possibility of challenging the evidence upon which the inclusion in the list has been decided, constitutes a breach of the right to effective judicial protection guaranteed by the Treaty. In such a case, and in the absence of jurisdiction of the European courts, it would fall upon national judiciaries to declare such Act legally void (in its

⁴⁴ Opinion in Case C-355/04, para. 107.

entirety and not only in relation to the person who has brought the challenge). And, in this respect, the ruling of the CFI was a lost opportunity since, had it put fundamental rights before political considerations, it should have declared the entire Regulation unlawful, possibly leaving the Member States a reasonable time to enact national rules freezing the assets of those on the list to avoid the danger of a general defreezing order. The same reasoning could also be made at national level, by relying on national constitutional law rather than EU law. In this respect, the doctrines of limited conferral of power espoused by the German and Italian Constitutional courts in the 1970s should be revived in relation to third pillar instruments.⁴⁵ As long as the EU does not guarantee fundamental rights protection to a level comparable to that guaranteed in national law, the national constitutional courts should retain the last word as to the compatibility of EU instruments (not only third pillar instruments but even second pillar) with their constitutional guarantees. And, similarly, this line of reasoning should be followed by the ECtHR which should clearly state that the (rebuttable) presumption of equivalent protection between the Community and Convention system does not apply in relation to acts of the European Union.⁴⁶

Second, the national courts could rely on the *Yusuf* ruling in relation to Common Position 2001/931, so as to justify the scrutiny of the compatibility of the Common Position with fundamental rights as general principles of EU law. In *Yusuf*, the CFI held that it could not assess the validity of the Regulation at stake, since it was implementing a Security Council Resolution. Since the Council had no discretion as to whether to include Mr Yusuf in the list, then the CFI could not assess the compatibility of the Regulation with the general principles of Community law, as that would have implied the review of the UN Council Resolution with Community law, something that the CFI felt was not possible. However, the CFI also held that it was in its power to assess the compatibility of the

⁴⁵ See German Constitutional Court rulings in *Internationale Handelsgesellschaft* CMLRep. (1974), p. 540 (*Solange I*); *Steinike und Weinlig* CMLRep. (1980) p. 531; *Brunner and others v. EU Treaty* 31 CMLRev. (1994), p. 57; and the Italian Constitutional Court rulings *Sentenza 7/3/64*, n. 14 (in F. Sorrentino, *Profili Costituzionali dell'Integrazione Comunitaria* (Torino: Giappichelli Editore, 1996, 2nd ed.), pp. 61 *et seq.* and *Società Acciaierie San Michele v. High Authority* (judgment of 27 December 1965, n. 98), CMLRep. (1967), p. 160.

⁴⁶ See *Case Bosphorus etc v. Ireland* (Appl. No. 45036/98), judgment of 30/6/05, note J.-P. Jacqué *Revue trimestrielle de droit européen* (2005), p. 756.

Regulation with the principles of *jus cogens* which bind the Security Council. If such reasoning is transposed to the EU system then, even should we find that the principle of supremacy applies also in relation to EU instruments and, therefore, such instruments cannot be assessed having regard to national constitutional law, it would be open to national courts to assess the validity of the Common Position in relation to fundamental rights as general principles of EU law. Again, since the principle of effective judicial protection is a principle of EU law, then the national courts would be entitled (as well as required) by EU law to take a proactive stance and assess whether inclusion in the list is justified.

This said, the situation is extremely unsatisfactory. The Council's response to the *OMPI* ruling, as well as its delay in renewing the existing list,⁴⁷ do not indicate a willingness to react to judicial assessments of the compatibility of the list with fundamental rights. Furthermore, a ruling at national level would not have effects beyond the jurisdiction of the court which issued the judgment and for this reason its effects in relation to EU instruments would be significantly limited, unless the Council were to be willing to act promptly to modify the list following a ruling of a national court to that effect.

5.6 Conclusions

The practice of identifying individuals and organisations as terrorists in a European instrument is obviously problematic from a fundamental rights perspective. The exercise of EU competence in this instance has considerably reduced, if not altogether eliminated, the possibility of a meaningful democratic debate about how best to address the terrorist threat and how to strike a reasonable balance between counter-terrorism action and the fundamental rights of those concerned. Furthermore, the Council's decision to use EU competence in such matters might well raise some questions as to whether the Member States acted instrumentally to avoid both democratic and judicial scrutiny. In this respect, consider the oddity of the domestic terrorist list: individuals and organisations are identified as terrorists in

⁴⁷ EU officials allegedly said that the non-renewal of the list within the prescribed time is simply a 'procedural problem', source *EUobserver*, 16 January 2007, 'EU backing down on EU terror list secrecy'. Mr Piris, Legal Adviser to the Council, allegedly held that the *OMPI* ruling concerned the preceding list and not the May list.

such a list, and yet the Member States are under no obligation to take action against such individuals/organisations. Given that the UN anti-terrorism Resolution requires States to act against terrorist organisations and individuals, one could well argue that the lack of action in respect of those entities and individuals is in breach of international law. The suspicion that inclusion in the EU domestic list might be politically motivated thus looms large in one's mind. If it is established that those people and entities are linked to terrorism, then action should be taken. Or else they should not be placed on the list. In any event, it is inexcusable that Union competence should be used so as to deprive individuals of their right to effective judicial protection.

In relation to the use of Community competence to provide for the freezing of assets of the foreign-linked 'terrorist', the fundamental rights issue might seem at first sight less pressing. After all, in those cases the Community judiciary has full jurisdiction. However, and leaving aside the issues arising from an extensive interpretation of Community competence to the detriment of individual rights, the *OMPI* ruling is evidence of the Community courts' unwillingness to exercise meaningful judicial scrutiny. Furthermore, Council has so far refused to take any steps to comply with that ruling; in a national context, such defiance would have been unthinkable; in the EU, allegedly based on the rule of law, it is all too possible.